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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re EVELYN A., et al., Persons Coming
Under the Juvenile Court Law.

IMPERIAL COUNTY DEPARTMENT
OF SOCIAL SERVICES,

Plaintiff and Respondent,

v.

ANA A., et al.,

Defendants and Appellants.

D044151

(Super. Ct. No. 19808)

APPEAL from a judgment and an order of the Superior Court of Imperial County,
Raymond A. Cota, Judge. Affirmed.

This case involves two medically fragile children, 12-year-old Cecilia B. and four-year-old Evelyn A., who were removed from their parents in Imperial County and have been living for more than four years in San Diego County with foster parents, who want to adopt them. The children's mother, Ana A. (the mother) and Evelyn's father (the

father) (together the parents) appeal the judgment terminating their parental rights to these children. The mother contends the Imperial County Department of Social Services (DSS) should be estopped from asserting the parents did not show an exception to adoption or the court should grant equitable relief based on fraud or mistake, and the court erred in denying a request for an evaluation to assess the sibling relationship. The father asserts the court erred in denying a Welfare and Institutions Code¹ section 388 petition for modification of orders regarding Evelyn and violated his due process rights during a hearing to participate in an examination of Cecilia. Each parent also joins in all issues raised by the other. We affirm the judgment and order.

FACTUAL AND PROCEDURAL BACKGROUND

On March 29, 2000, then seven-year-old Cecilia and her four younger half-siblings, Harley A., Caroline A., Justin A., and Joshua A., were removed from the parents custody. DSS petitioned on their behalf, alleging there was medical neglect; Cecilia's biological father failed to protect her and left her with the parents; the parents refused to seek medical attention for Cecilia and she was taken by life flight to San Diego Children's Hospital; all the children were inappropriately dressed and soiled with dry feces on their buttock and genital areas and were sitting on the dirt without underwear; Harley had paraphymosis of his penis; Caroline had severe diaper rash; Justin's eyes were red; and the mother was unable to provide regular care because of a developmental disability. The petition was later amended to allege the parents had been seen abusing drugs and alcohol

¹ All statutory references are to the Welfare and Institutions Code.

around the children and Harley was born with drug and alcohol complications. DSS reported the family had prior child protective referrals in Arizona and Nevada for neglect and substance abuse.

Cecilia appeared emaciated, weighed only 38 pounds and had a tremor. She had severely elevated glucose levels, indicating juvenile onset diabetes. Testing showed she had language delay, the skills of a three to four year old and was moderately mentally retarded.

On April 25, 2000, the court sustained the petitions under section 300, subdivision (b). It was stipulated that Joshua and Justin would be placed with the parents and Caroline and Harley would be returned when they no longer needed medical treatment. The court ordered Cecilia placed in foster care in San Diego.

DSS recommended services, including parenting classes, substance abuse treatment, therapy, an educational program on diabetes for the parents, and anger management for the father if recommended by a psychologist. By June 27, 2000, DSS recommended returning the four younger children with a court-ordered family maintenance plan, but suggested foster care for Cecilia because her health had not stabilized. There was concern that because the mother had tremors she would not be able to inject Cecilia's insulin, Cecilia was unable to recognize signs of hypoglycemia, and unsanitary conditions at the home could lead to infections. Cecilia's foster father reported she was like a caged animal when she first came to their home and her blood sugar levels dropped when she was under stress. He said that she said she was afraid of the parents and did not want see them.

The Court Appointed Special Advocate (CASA) reported the children who had been returned to the parents were living in very dirty conditions and their medical needs were not being met. She said there was no refrigerator to store Cecilia's medications and the mother did not understand how to care for her, give her injections or monitor her blood sugar levels. The CASA was also concerned for the children's safety because there was a canal near the family campsite and a large pit where they burned trash. During the interview the father was angry, loud, but articulate, self-serving, and he talked incessantly and bragged about himself. He showed a narcissistic personality disorder with histrionic personality traits and antisocial personality features. Testing showed he has high average intelligence. The mother has tremors and borderline to low average intelligence. The psychologist said she was suspicious, defensive, paranoid and anxious and had narcissistic personality characteristics with obsessive-compulsive personality traits and paranoid and histrionic personality features. The psychologist expressed concerns regarding fetal alcohol syndrome. He cautioned it was likely the children were bonded to the parents and each other and it would be traumatic to separate them.

At the disposition hearing on August 29, 2000, on the parents' motion, the court named the father as Cecilia's defacto parent. The court declared the children dependents of the court, ordered family maintenance services regarding Joshua, Justin, Caroline and Harley, removed Cecilia from the mother's custody, and ordered reunification services for the mother as to Cecilia.

Cecilia's therapist said Cecilia was afraid of being returned to the parents and of dying in their care. The therapist reported that during a visit the father told Cecilia he

would be taking her home after the next court hearing and as a result Cecilia decided to make herself physically ill by not eating and by not following her diet.

At a hearing on November 16, 2000, the court terminated the dependencies of Joshua, Caroline, Justin and Harley. It continued Cecilia in foster care and ordered an overnight visit for her at the parents' home.

Cecilia had four 48-hour visits with the parents during November and December, 2000. During the visits the parents did not provide her with her allergy or asthma medications or follow the insulin scale. On December 21, the mother and the father did not return Cecilia from a visit and the court issued a protective warrant. On January 9, 2001, DSS filed a supplemental petition on Cecilia's behalf, alleging the parents did not provide proper medication for her during visits. On February 27, the court sustained the petition and granted six more months of reunification services for the mother.

On November 27, 2000, Evelyn A., who had been born to the parents in September 2000, was admitted to Children's Hospital with pneumonia. She was diagnosed with failure to thrive due to nutritional deprivation. She had an asymmetric head, abnormal ear, only one kidney and gastroesophageal reflux. Doctors said she was suffering prenatal-onset retardation with hearing loss. She threw up constantly, but in the hospital gained weight. On December 5, DSS petitioned on Evelyn's behalf under section 300, subdivision (b). On March 19, 2001, the court sustained the petition and on June 7 declared her a dependent child and ordered reunification services. Evelyn was placed in the same foster home as Cecilia.

The social worker reported although Cecilia's physical condition was stable, she required close supervision and medication and during visits the father refused to follow the recommended medical treatment. Cecilia said she wanted to visit her "desert family," but did not want to live with them. In May 2001, the CASA reported Cecilia had shown tremendous physical, emotional and mental growth in the foster home, but because of their medical conditions, she and Evelyn required emergency care at least once each month. The CASA expressed great concern that each time Cecilia visited the parents the father exposed her to severe mental anguish and the parents did not provide her medical care, the father saying she did not need it. At the review hearing on June 7, the court continued Cecilia as a dependent child and ordered additional services.

The psychologist who conducted a second psychological evaluation reported the mother would have a difficult time identifying, addressing and seeking treatment for a medically needy child and she lacks the psychological insight to understand that she cannot give adequate care.

In August 2001, the social worker reported he had received reports that Evelyn had been severely sunburned during an unsupervised visit, and Cecilia became emotionally upset because the father told her he wanted to take her "back to the desert." The social worker suspended unsupervised visits. He also reported the father had made numerous telephone calls during which he rejected the medical diagnoses and complained about DSS's treatment of the family. Cecilia's therapist reported Cecilia's confusion about reunification and contact with her family places her at risk. The therapist also reported Cecilia said she had frequently watched sexual relations between

the parents, had seen the father hit the mother, and said the father has "magic hands" that could make her diabetes go away. There was also a report that the father may have sexually abused Cecilia by inserting his fingers into her vagina.

On September 5, 2001, the social worker reported Evelyn required a gastric feeding tube because of her reflux problems. On September 26, the court continued the children in foster care. It suspended visitation between Cecilia and the father based on the CASA's and Cecilia's therapist's concern that visits were interfering with her diabetes treatment.

On October 9, 2001, DSS filed a subsequent petition regarding Cecilia, alleging that there was domestic violence between the parents and the father had sexually molested Cecilia. It also petitioned on behalf of Joshua, Justin, Caroline and Harley, alleging domestic violence, Cecilia's sexual abuse, and alcohol and marijuana use by the parents. The social worker reported Evelyn underwent a surgical procedure for placement of a gastric feeding tube. He said the father was more concerned with discrediting the doctors' diagnoses than learning how to care for her. He recommended terminating reunification services.

On November 26, 2001, the parents pleaded no contest to the allegations of the new petitions regarding substance abuse and domestic violence. The court struck the allegations regarding sexual abuse and found the remaining allegations true. It ordered reunification services and placed Joshua, Justin, Caroline and Harley in foster care. On December 20, the court terminated reunification services as to Cecilia and ordered a permanent plan of long-term foster care. It continued services regarding Evelyn.

The parents moved from their campsite into a house in Niland and the father's therapist recommended returning Joshua, Justin, Caroline and Harley to them. On February 13, 2002, the court ordered their return with a family maintenance plan.

The social worker reported Evelyn had unsupervised visits with the parents in March and April 2002. The social worker reported Cecilia was sexually acting out and after visits had increased tremors and higher blood sugar levels and was defiant. Over objections by minor's counsel, the court expanded overnight visits for Evelyn. The social worker reported that on May 1, Evelyn became ill with strep throat during a visit. He said that on May 7, Joshua was home from school with an ear infection, and the father said he had not taken him to a doctor because he was waiting for his immune system to "kick in." On May 15, the social worker went to the home and saw all of the children in the care of another individual who lived there. Evelyn was filthy and had not been fed through her gastric tube or had a breathing treatment for more than four hours even though the parents had been instructed to administer the treatments every three to four hours. In May, the court ordered a 30-day visit for Evelyn. The day after the visit began, however, the social worker went to the house and found Evelyn had not had her tube feeding at the proper time. Evelyn was removed and returned to foster care in San Diego. Evelyn's doctor stated she had not given the foster mother a set feeding schedule, but it was better for Evelyn if the feedings were at predictable times.

In a report filed June 17, 2002, the social worker reported Joshua, Justin, Caroline and Harley appeared to be in good health. The parents were maintaining an adequate home and were participating in services. The father's therapist said the father had

stopped using drugs and alcohol and was making an effort to change some of his negative behaviors, but he needed to work on his suspicious nature and over-inflated sense of self. On July 31, the court terminated the dependencies of Joshua, Justin, Caroline and Harley.

In a report dated July 3, 2002, the social worker reported the father had alleged that Cecilia was being abused in her foster home. The allegation was found not to be substantiated. Cecilia told the CASA she missed her mother and siblings, but did not want to return home if the father were there. Cecilia's therapist opined Cecilia did not benefit from visits with the mother.

On September 24, 2002, the social worker reported Evelyn continued to have many health problems, including respiratory difficulties, moderate developmental delays, and she required daily feedings through a gastric tube. The parents had training for use of the gastric tube and the father's therapist reported he continued to make good progress in therapy. The social worker recommended long-term foster care for Evelyn because of the need for the gastric tube feedings. The CASA recommended more frequent visits for Evelyn and the parents. The social worker and Cecilia's therapist recommended terminating visits between Cecilia and the mother. On January 8, 2003, the court continued visits and ordered a psychological evaluation of Cecilia to determine whether visits were detrimental. It also terminated reunification services concerning Evelyn and placed her in long-term foster care.

On February 3, 2003, the father moved to reinstate his status as Cecilia's defacto parent. He argued he was named her defacto parent in August 2000, but since July 2002

had been excluded from proceedings involving her. On April 16, the court ruled the father was Cecilia's defacto parent.

On June 24, 2003, the CASA reported Cecilia did not want to return to the parents and she recently had been hospitalized for diabetes complications. She said she hoped to live with her grandmother.

The parties stipulated that psychologist Constance Dalemberg, Ph.D., would assess all relevant evidence and address visitation between Cecilia and the mother and a recommendation of a permanent plan of guardianship. Dr. Dalemberg summarized the case and reported when she met with the mother, the mother could not admit any problems with the family's child rearing and could not comprehend ever disagreeing with the father. Dr. Dalemberg said Cecilia is mildly to moderately mentally retarded and shows signs of posttraumatic stress disorder in relation to the father. She also noted an attachment disorder in Cecilia's longing for her grandmother, whom she barely knew, and said she has no bond with the mother. She recommended long-term therapy, a full neuropsychological evaluation and a permanent plan for Cecilia's future. She said that keeping Cecilia in an instable state affects her physical and psychological health and opined the parents do not have the ability to manage a medically fragile child. She opined that Cecilia may not have been sexually abused, but over-exposed to sexual images by, for example, watching the parents have sexual relations and frequently seeing them in the nude. She also stated because of developmental disabilities Cecilia and probably Evelyn would need intensive educational and occupational help in order to live semi-independent lives as adults. She supported the continued removal of Cecilia and

Evelyn from the parents and opined they could not improve sufficiently for the benefits of returning the children to outweigh the risks.

The social worker noted the parents were attentive and happy to see the children during visits, but Cecilia had to be encouraged to hug and kiss the mother and neither child showed any sadness when visits were over. Two CASA's recommended visitation be terminated and a section 366.26 hearing set.

On October 15, 2003, the court set a section 366.26 hearing. On November 19, the parents petitioned under section 388, requesting the girls be returned and the dependencies terminated. On November 26, the court informed the parents that the foster parents had requested to adopt the girls.

In the assessment report the social worker noted the girls' developmental delays and health problems and said Cecilia's glucose levels fluctuated and her behavior deteriorated after visits with the mother. Evelyn continued to receive most of her nutrition through a gastric tube. Both girls were in special education classes. The mother had monthly visits with both girls and the father a monthly visit with Evelyn. The social worker said the girls were bonded to each other, but not to the parents; and the foster parents, with whom the girls had been placed since 2000, loved them and wanted to rear them together.

At the section 366.26 hearing and the hearing on the parents' section 388 petition, the father testified the family had moved from their trailer to a home on five acres in Niland. He said they had utilities and telephone and medical access. He said he had been taking medication for attention deficit disorder and had completed anger management

classes, Narcotic Anonymous, therapy, and diabetes and feeding training. He testified he worked as an unpaid advocate for the disabled, including those who are incarcerated, and some of his clients live on the family property. He said he stopped using alcohol two months earlier. He testified the mother has tremors, preventing her from doing some daily activities. He said he would follow medical requirements if the children were returned home and his primary obligation was to protect his children.

Cecilia testified she missed her brothers and sister, but did not want to go to the parents' home because the parents scare her. She testified she saw the father hit the mother and the mother cried. She said she liked living with her foster parents and Evelyn and wanted to live with them forever.

Dr. Dalemberg testified about her evaluation of the circumstances of the case and opined that returning the girls to the parents would not be in the girls' best interests. She noted Cecilia's fears and the parents' use of drugs and alcohol and said Cecilia liked her siblings, but told her she would not be sad if she did not see them. She said Cecilia was not bonded to the mother. She was concerned that the father considered himself a medical expert and had a narcissistic personality disorder with antisocial features and worried the mother would not recognize a medical crisis or ever disagree with the father. She was especially concerned that the parents had not noticed anything was wrong with Cecilia when at age seven she looked like a three year old and had gained only one pound in a year.

Gloria Mendez, a licensed home care worker testified she provided services in the parents' home, knew how to treat diabetes and operate a breathing machine and gastric tube and was prepared to provide care for Cecilia and Evelyn.

The mother testified that during the last visit Cecilia and Evelyn said they loved her and missed her. She testified about Cecilia's health problems and about caring for her. She said she used the gastric tube when Evelyn visited and the girls' medical problems were "a little bit" serious. She said she would protect the girls and would believe a doctor's instructions even if the father disagreed.

The parties stipulated that if Cecilia's physician were to testify she would say the parents are capable of taking care of the girls' medical needs and the parents had completed diabetes training.

The social worker who prepared the February 2, 2004 report testified about instances when Cecilia became fearful and ran away from school and how stress caused her glucose levels to change and caused behavior problems. She opined adoption was the best permanent plan for the girls and they should not be returned to the parents. She said the parents' home was not adequate for the children's needs, Cecilia and the mother do not have a parental relationship and the father did not interact much with Evelyn during visits, instead spending time talking about the case with the social worker.

At the close of evidence, the court denied the section 388 petition. It found both girls were likely to be adopted and ordered parental rights terminated.

DISCUSSION

I

The parents contend DSS should be estopped from claiming they did not meet their burden to show an exception to adoption or they should be granted equitable relief based upon extrinsic fraud or mistake. They claim DSS falsely promised that Evelyn would be in long-term foster care until her gastric tube was removed and then she would be returned home, and in return the parents submitted to the social worker's recommendations. They argue DSS then noticed an intent to file a section 388 petition to modify the permanent plan to guardianship and then gave notice that the permanent plan would be adoption. They argue DSS should be estopped from asserting they did not show there was a beneficial relationship between them and Evelyn or a sibling relationship between Evelyn and her siblings.

The parents waived these arguments by not raising them in the juvenile court. (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 502.) At the hearings in which their parental rights were terminated and their section 388 petition denied, the parents did not argue they were falsely promised that in exchange for their submitting on the social worker's recommendations, Evelyn would be returned after the gastric tube was removed. Further, on May 7, 2003, all parties stipulated that Dr. Dalemberg would consider all the evidence and provide an assessment and make a recommendation regarding visitation between the mother and Cecilia and a recommendation for a permanent plan. The parents had waived the arguments that there were any false promises made to them.

II

The parents contend the court abused its discretion in denying their request for a bonding study to assess the sibling relationship. We find no abuse of discretion.

When a court sets a section 366.26 hearing it must order an assessment that includes a review of the amount and nature of the contact between the child and the parents and members of the child's extended family, including siblings. (§§ 361.5, subd. (g)(2), 366.21, subd. (i)(2), & 366.22, subd. (b)(2).) There is no requirement of a bonding study to assess the relationships between the child and his or her siblings.

In this case, by agreement of the parties, Dr. Dalemberg conducted a review of the case and submitted a 96-page assessment, which included an review of the relationships among all of the children. The court considered the assessment in making the judgments.

It is the burden of the party who seeks to establish the existence of one of the exceptions to adoption of section 366.26, subdivision (c)(1) to produce evidence of the exception. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 252.) Section 366.26, subdivision (c)(1)(E) provides an exception to adoption if "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared with the benefit of legal permanence through adoption."

Substantial evidence was presented to show the sibling exception of section 366.26, subdivision (c)(1)(E) did not apply. Cecilia was removed from the parents in March 2000, when she was seven years old. She had lived with her foster parents since that time and had bonded with them and with the other children in the home. Evelyn was removed from the parents when she was two months old. She had not lived with her siblings since that time. Cecilia told the court she liked living with the foster parents and with Evelyn and wanted to stay with them forever. Dr. Dalemberg and the social worker testified Cecilia and Evelyn did not have a bond with Joshua, Justin, Caroline and Harley. The social worker testified after observing the children during a visit, "I don't think they really have a relationship as brothers and sisters or siblings. When I have seen them together, I see them more like they see each other as playmates, as friends. [¶] . . . [¶] They just play together. They don't show any feelings towards each other." Dr. Dalemberg said Cecilia told her she liked to be with her half-siblings, but she had a hard time remembering their names and if she did not see them very often she would not miss them very much. There was no evidence that Cecilia and Evelyn shared significant common experiences or strong bonds with the four siblings that would outweigh the benefits to the two girls of legal permanence through adoption.

III

The parents contend the court erred in denying their section 388 petition for modification of orders regarding Evelyn. They argue returning her to their care was conditioned solely on their ability to administer gastric tube feedings and at trial the parties stipulated that Cecilia's physician, Dr. Jacobson, stated the parents were capable

of providing for all of Evelyn's medical needs, including the gastric tube feedings. The court did not abuse its discretion in denying the petition.

Section 388, provides in part:

"(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstances or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of the court previously made or to terminate the jurisdiction of the court. . . . [¶] . . . [¶]

"(c) If it appears that the best interests of the child may be promoted by the proposed change of order or termination of jurisdiction, the court shall order that a hearing be held"

In order to gain the relief sought in a section 388 petition, the petitioner must show a change of circumstances or new evidence plus the change sought is in the child's best interests. (§ 388; Cal. Rules of Court, rule 1432(c); *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) "It is not enough for the parent to show *just* a genuine change of circumstances under the statute. The parent must [also] show that the undoing of the prior order would be in the best interests of the child." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) The petitioner bears the burden of proof to make both of these showings. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) A reviewing court will not disturb a court's ruling in a dependency proceeding ""unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]."" (*In re Stephanie M., supra*, 7 Cal.4th at p. 318, quoting *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 421.)

Substantial evidence supports a finding that although there were some changed circumstances in the family's living environment, significant concerns remained about returning Evelyn to the parents' care. At the hearing, the father testified about how the family had moved to a house in Niland and there was a fire station and medical clinic nearby. The four children in the home were doing well and the family had set up a medical treatment area at the house. However, there was no evidence that there had been significant changes in the parents' attitudes about medical treatment or their abilities to recognize potential life-threatening medical conditions. Dr. Dalemberg testified the father continued his attitude of not listening to medical doctors. She expressed concern the parents would not follow through with medical appointments and doctors' orders. She noted the parents had not noticed Cecilia looked like a three year old at age seven and had not been concerned that she gained only one pound in a year and she worried they would not notice symptoms of medical problems for the two girls.

Also, the parents did not show that returning Cecilia and Evelyn to their care was in the girls' best interests. Dr. Dalemberg opined returning the girls to the parents would not be in their best interests because of Cecilia's fear and posttraumatic stress disorder, which caused stress to her and influenced her blood sugar levels causing serious health implications. Cecilia indicated she was afraid she would die if she were returned to the parents and she feared the father because of past domestic violence. Dr. Dalemberg expressed concern that Cecilia's and Evelyn's special medical needs required more care and commitment than the parents would provide. Cecilia testified she missed her siblings, but did not want to visit them at their home because she was afraid of the

parents. She said she wanted to live with the foster parents and Evelyn forever. The social worker testified Cecilia sometimes had to be prompted to hug the mother and neither girl had a parent-child relationship with the mother. There was evidence Cecilia's and Evelyn's strong bonds were with the foster parents, not with the parents. The parents did not show an abuse of discretion in the court's denying the section 388 petition.

IV

The parents contend the court violated the father's due process rights by preventing him from participating in the cross-examination of Cecilia. He argues as a defacto parent he had the right to be present and to participate in the hearing.

Defacto parents have the right to be present at dependency hearings, the right to be represented by counsel and the right to present evidence. (*In re Kieshia E.* (1993) 6 Cal.4th 68, 77, fn. 7.) Although defacto parents must be afforded procedural due process so that they may exercise their recognizable interests in the child (*In re Matthew P.* (1999) 71 Cal.App.4th 841, 850), they do not have the right to custody, visitation or reunification services. (*In re Kieshia E, supra*, 6 Cal.4th at p. 77, fn. 7.) "The essence of due process is fairness in the procedure employed." (*Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 757.)

Assuming the court erred in not permitting the father to participate in the cross-examination of Cecilia, the parents cannot shown prejudice even under a standard of whether the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Cecilia testified she did not want to go to the parents' home because the parents scare her, she saw the father hit the mother and the mother cried, and

she liked living with the foster parents and Evelyn and wanted to live there forever. The father offers no suggestion about how his cross-examination of Cecilia could have changed this testimony or how it could have changed the juvenile court's decisions. Any error in not allowing the father to cross-examine Cecilia was harmless beyond a reasonable doubt.

DISPOSITION

The judgment and order are affirmed.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.